

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

MICHAEL CETTA, INC. d/b/a
SPARKS RESTAURANT

and

CASES 02-CA-142626 and 02-CA-144852

UNITED FOOD AND COMMERCIAL
WORKERS LOCAL 342

**REQUEST FOR PERMISSION TO FILE SPECIAL APPEAL FROM RULING ON A
VIDEOCONFERENCE HEARING AND BRIEF IN SUPPORT OF AN IN-PERSON HEARING**

Comes now RESPONDENT, Michael Cetta, Inc. d/b/a Sparks Restaurant, pursuant to Section 102.26 of the National Labor Relations Board's Rules and Regulations, and brings the following Request for Permission to File Special Appeal to Video Hearing and its attendant brief in support for an In-Person hearing. Permission to file this special appeal should be granted because: (1) this Compliance Specification presents complex documentary issues; (2) this Compliance Specification presents cumbersome documentary issues which cannot be satisfied through any of the Zoom procedural "safeguards" – a level of document complexity not contemplated by any ruling of the National Labor Relations Board; and (3) the Board's default position to follow its earlier rulings that the COVID-19 pandemic constitutes "compelling circumstances" such that remote hearings are appropriate, should no longer apply at this time.

Background

On April 20, 2021, Administrative Law Judge Chu issued a written Pretrial Order for a Video Hearing via the Zoom Platform. However, this Order is unsupported by any critical analysis of the facts and circumstances of this particular case. Instead, the Order appears to be motivated by nothing more than the previous issuance of a video trial order. (Pretrial Order, p.1.) Respondent does not seek any delay in requesting an in-person hearing, and all of its participants are prepared to sign any appropriate waivers with respect to health and safety issues and precautions. The previous order contemplated by the Board requiring remote

hearings (see *Morrison Healthcare*, 369 NLRB No. 76 (2020)) was put into effect on May 11, 2020, long before people in America were able to get Covid-19 vaccines, or had an idea how to navigate in the pandemic world. However, now more than 215 million individual have been at least partially inoculated.¹ The Pretrial Order would set a dangerous precedent to automatically default to remote hearings today, when the facts that support it are based on a period of time when there were no answers on how to conduct a trial during the pandemic – i.e., outdated information. Instead, the focus should be on the type of case we are dealing with, and the application of a reasoned analysis on whether the procedural safeguards have any likelihood of protected the rights of all parties to the litigation.

1. The Documentary Issues in this Case

All of the parties to this proceeding acknowledge that approximately forty, and possibly more people will be called as witnesses during the Compliance Specification. The Specification itself is several hundred pages, which alone burdens even the most sophisticated document sharing servers, such as Respondent's counsel. Moreover, thirty-six of the witnesses in this case are individuals who are unrepresented by counsel and not attuned to the nuances of the standard requirements of an NLRB proceeding, let alone participating in one via Zoom. Each and every one of these witnesses will be subpoenaed, requiring the production of documents which include their: (1) job search history; (2) financial and tax information; and (3) other data that Respondent is not required to disclose at this time for trial strategy purposes.

It is not speculative to state that these non-represented individuals who are served with these subpoenas who (in a virtual setting) would be required to produce large quantities of documents will struggle to comply with their obligations. There is no reason to subject lay-witnesses to an increased burden of expert level development of their Informational Technology skills, when the entire problem would be obviated by permitting them to simply disclose the required materials in-person at the time called upon in their respective subpoenas.

If the Compliance Specification is held virtually, and when these witnesses inevitably claim confusion regarding their obligations and an inability to produce completely responsive documentary answers, it will be the Respondent who will suffer irreparable damage to its ability to meet its evidentiary obligation. This would be a failure of due process, and thus requires an in-depth analysis in the substantial likelihood that Respondent will suffer damages from the trial inequities from which it cannot recover.

¹ [WWW.covid.cdc.gov/covid](https://www.covid.cdc.gov/covid) data tracker

2. Zoom Procedural “Safeguards”

In finding that virtual hearings are appropriate, the Board relies upon Section 102.121 of its Rules and Regulations, that it is permitted to “liberally construe[] the rules “to effectuate the purposes and provisions of the Act.” *Beaumont Hospital*, 370 NLRB No. 9. slip op. at 2 (2020). First, the Board’s Procedural Safeguard of a Courtroom Deputy and Host is an inadequate safeguard. As stated in the Pretrial Order, such Deputy shall be an “NLRB Board-side attorney.” (Pretrial Order, p.1.) Standing alone, this violates New York Code of Professional Responsibility, Canon 9, which requires “A Lawyer Should Avoid Even the Appearance of Impropriety.” Placing an NLRB-side attorney in charge of previewing documents and operating the Zoom break-outs (i.e., private rooms) while that person works with the very individuals whom are prosecuting the case, does not give an objective observer confidence that the evidence will be handled in an appropriate manner. At best, a courtroom deputy should be a third party with no affiliation with the case whatsoever.

Additionally, lay witnesses are unlikely to be able to provide information that they are obligated to provide utilizing the Zoom and deputy processes. Not everyone in the United States has been subjected to video meetings as part of their lives. The witnesses here are all former (and some current) restaurant employees. Their profession (or past profession) does not require them to possess the technical knowhow or equipment that is required under the Pretrial Order. In the likelihood that some witnesses will be required to use public computers in order to participate in the hearing process, the Pretrial Order does that afford that witness the opportunity to privately upload sensitive materials.

3. Hearing Complexity

In its two main decisions contemplating motions for an in-person hearing, the Board relies heavily on the notion that trial difficulties can be raised before the trial judge and adjudicated as the hearing progresses. *Beaumont Hospital*, at 2.; *XPO Cartage*, 370 NLRB No. 10 (2020). However, this case sets itself distinctly apart from both of those decisions. The parties and the Administrative Law Judge concede that this case will run numerous weeks, possibly even as long as two months. With the amount of witnesses that will be called at this Compliance Specification, the amount of issues that need to be resolved for each witness (e.g., their efforts to find work), and the documentary and procedural safeguard issues stated above, the prudent action would to not subject both the parties and non-parties to an experiment on whether a complex, long-lasting Zoom trial will work. Respondent’s remedy of its right to take

exception to the due process deficiencies that a Zoom Compliance Specification will cause here under Section 102.46 of the Rules and Regulations, offers little solace.

4. Lack of Compelling Circumstances

Respondent does not challenge the Board's authority to compel remote hearings based upon a finding that compelling circumstances, such as "[t]he current Coronavirus Disease (COVID 19) pandemic constitutes ... warranting a remote hearing." *Morrison Healthcare*, at 2. However, the Board's orders during the unknown state of the pandemic in early 2020 requires reevaluation for the actual circumstances in the United States in mid-2021.

In the State of Minnesota v. Derek Chauvin (case 27-CR-12646), the entire country witnessed a high-profile murder case that was conducted in-person, in a courtroom where a judge, jury, attorneys and witnesses were all spaced from each other in compliance with the guidelines provided by United States government recommendations. In-person hearings and trials are taking place now across the country. All courts in New York, where this trial place if done in-person, began in-person trials on March 22, 2021.² Moreover, Administrative Law Judge Chu is himself conducting an in-person hearing in June – just one month after this matter is set for hearing.

The fact that during the pretrial conference conducted by Administrative Law Judge Chu on April 9, 2020 (Pretrial Order, p.1), the attorneys for the Region admitted that its offices have made zero effort to make its courtrooms at safe for in-person hearing participants is irrelevant. As the prosecuting agency, it is the Board's obligation to find the appropriate space where the parties, witnesses, administrative law judge, and the parties' counsel can conduct an in-person hearing according to the United States government's recommendations. The National Labor Relations Board's regional offices have access to hundreds of facilities where they can conduct hearings. They also have the ability partner with other government agencies to find an appropriate space. If neither a regional office or other government space is available, Respondent is willing to share in the expense if a third-party site is required to conduct and in-person hearing. However, Respondent seeks assurance that its full rights to due process will be satisfied through a trial proceeding that is not determined by an outdated determination of appropriateness.

² See <http://www.nycourts.gov/>, and <https://www.wshu.org/post/new-york-resume-person-jury-trials-month-after-nearly-year-virtual-only#stream/0>

Conclusion

For all of the foregoing reasons, Respondent respectfully requests that the National Labor Relation Board grant permission for taking of a Special Appeal and issue an order that this matter proceed to an in person hearing as directed by the Regional Director.

Respectfully Submitted,

/s/ Michael MacHarg

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CERTIFICATE OF SERVICE

I certify that on April 12, 2021, I electronically filed Respondent's Petition to Revoke Subpoena in Case 02-CA-142626 and Case 02-CA-144852 with the Region 2 Regional Director using the NLRB E-Filing System, and I hereby certify that I provided copies of the same document, via electronic mail, on the following parties:

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Administrative Law Judge Kenneth Chu

Dated April 26, 2021

Respectfully Submitted,

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